Tentative Rulings for September 1, 2015
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

10CECG02345 ***In re Alexis Daniel Ramirez*** **(Dept. 402)**

15CECG01891 ***Moreno v. Arboleda Homeowners Assoc. et al.*** **(Dept. 403)**

14CECG02607 ***Springsted and Wathen v. Blast Fitness*** **(Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG01439 ***Michael O'Rear v. Paul Clarke, et al.*** **is continued to September 9, 2015, at 3:30pm in Dept. 503**

12CECG03724 ***Families and Schools Together Federal Credit Union v. Auto Maxx, Inc.*** **is continued to Tuesday, September 15, 2015 at 3:30 p.m. in Dept. 501.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(23)

Tentative Ruling

Re: ***James Menefield v. Matthew Cate***
Superior Court Case No. 13CECG03245

Hearing Date: Tuesday, September 1, 2015 (**Dept. 402**)

Motion: Defendant California Department of Corrections and Rehabilitation's, Walter Oxborrow's, Paul Brazelton's, Ainsworth Walker's, and Nathaniel Greene's Motion for Leave to File Amended Answer

Tentative Ruling:

To grant Defendants' motion for leave to file amended answer. (Code Civ. Proc., § 473, subd. (a)(1).) Defendants shall file and serve the first amended answer within 10 calendar days after service of the minute order. All new allegations must appear in **boldface** type.

Explanation:

Defendants California Department of Corrections and Rehabilitation, Walter Oxborrow, Paul Brazelton, Ainsworth Walker, and Nathaniel N. Greene ("Defendants") move the Court for an order granting them leave to file a first amended answer to Plaintiff James Menefield's ("Plaintiff") complaint. Plaintiff has stipulated to allow Defendants to file an amended answer. (Defendants' Motion for Leave to File Amended Answer, Declaration of Lucas L. Hennes, ¶ 4 and Exhibit A.) Therefore, the Court grants Defendants' motion for leave to file amended answer.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 8/31/15 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(29) **Tentative Ruling**

Re: ***Emma Dunn v. Community Regional Medical Center Hospital***
Superior Court Case No. 14CECG03542

Hearing Date: **September 1, 2015 (Dept. 403)**

Motions: Deem Requests for Admissions admitted
Monetary sanction

Tentative Ruling:

To grant Defendant's motion for an order deeming matters admitted. The truth of all matters set forth in Defendant's request for admissions, set one, is deemed admitted by Plaintiff Emma Dunn. Plaintiff is ordered to pay monetary sanctions in the amount of $322.50 to the law offices of Stammer, McKnight, Barnum & Bailey.

Explanation:

Defendant served its request for admissions, set one, on Plaintiff by mail on April 28, 2015. Plaintiff's responses were due June 3, 2015. (Code Civ. Proc. §§ 2033.250(a), 2016.050, 1013(a).) As of July 22, 2015, Defendant had not received Plaintiff's responses. (Decl. of Abigail Leaf, ¶5.) Accordingly, Defendant's motion for an order deeming matters admitted is granted. (Code Civ. Proc. §2033.280(b),(c).)

Defendant's request for sanctions is granted, but in the reduced amount of $322.50, representing 1.5 hours of attorney time and the $60 filing fee. (Code Civ. Proc. §2033.280(c).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 08/27/15 .
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: ***Lee v. Fresno Unified School District***
Superior Court Case No. 14CECG02712

Hearing Date: **September 1, 2015 (Dept. 403)**

Motions: Defendant's motion to compel

Tentative Ruling:

To take the matter off calendar in light plaintiff's counsel's demise. The trial and related dates are vacated. A status conference shall be set within 90 days. Within 10 days from the date of this order defense counsel shall contact the court to schedule the status conference.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 08/31/15.
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: ***James v. Wells Fargo Bank, N.A., et al.***
Superior Court Case No. 15CECG01024

Hearing Date: **September 1, 2015 (Dept. 403)**

Motions: Defendant Wells Fargo's demurrer to the First Amended Complaint

Tentative Ruling:

To sustain the demurrer. Leave to amend is granted. Plaintiff is granted 20 days' leave to file the second amended complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations in the seconded amended complaint are to be set in **boldface** type.

Explanation:

Demurrer – in General

Generally, "[i]n determining the merits of a demurrer, all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.)

Where the complaint fails to plead ultimate facts, the complaint is subject to a demurrer. (Code of Civil Procedure § 430.10(e); *Berger v. California Ins. Guar. Ass'n* (2005) 128 Cal.App.4th 989, 1006.) Essentially, "[a] complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the *evidence* by which he hopes to prove such ultimate facts." (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 CA3d 1371, 1390.) Essentially, "'conclusory allegations will not withstand demurrer.'" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 quoting *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160.)

Additionally, "[o]bjections that a complaint is ambiguous or uncertain, or that essential facts appear only inferentially, or as conclusions of law, or by way of recitals, must be raised by *special demurrer,* and cannot be reached on general demurrer." (*Johnson v. Mead* (1987) 191 Cal.App.3d 156, 160.) However, "[a] demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.)

Breach of Contract Causes of Action – Causes of Action One through Four

A threshold element to establishing a breach of contract cause of action is the existence of a contract. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Additionally, a complaint asserting a cause of action for breach of contract must allege whether, "the contract is written, is oral, or is implied by conduct." (CCP § 430.10(g); see *Maxwell v. Dolezai* (2014) 231 Cal.App.4th 93, 99 [specific allegations the contract was written, and setting forth the date of formation, was sufficient to withstand a demurrer under CCP § 430.10(g).].)

Also, simply alleging the defendant "breached" the contract is conclusory and thus insufficient. (*Bentley v. Mountain* (1942) 51 Cal.App.2d 95, 98.) There must be factual allegations describing the conduct giving rise to the alleged breach. (*Ibid*.)

Here, the First Amended Complaint ("FAC") fails to allege whether the contract was, written, oral or implied. (CCP § 430.10(g).) As such, the demurrer to the breach of contract causes of action can be sustained on that ground alone. (*Maxwell v. Dolezai* (2014) 231 Cal.App.4th 93, 99.) Moreover, as they are all premised on the alleged breach, which is insufficiently plead, the causes of action for breach of the implied covenant, promissory estoppel and anticipatory breach are similarly insufficient.

Lastly, the FAC attaches exhibits relating to two separate foreclosure proceedings in 2011 and 2015. Yet, the FAC is uncertain whether the alleged breach arose from the 2011 foreclosure proceedings or the 2015 foreclosure proceedings. Thus the special demurrer is sustained as well. (CCP § 430.10(f).)

Causes of Action under the Homeowner Bill of Rights – Causes of Action Five through Eight

Similarly, the Homeowner Bill of Rights causes of action are uncertain as to whether the operative facts arose from the 2011 foreclosure proceedings or the 2015 foreclosure proceedings. Accordingly, although the plaintiff alleges he was neither contacted by the servicer (FAC, ¶ 73), nor was appointed a single point of contact (FAC, ¶ 82), it is uncertain whether these allegations are directed at the 2011 foreclosure or the 2015 foreclosure. Additionally, the plaintiff does not allege he submitted a completed application which is necessary to implicate Civil Code § 2923.6.

The uncertainty of whether the plaintiff's allegations are directed at the foreclosure proceedings of 2011 or the foreclosure proceedings of 2015 subjects each cause of action asserted under the Homeowner Bill of Rights to the special demurrer. The special demurrer is sustained as causes of action five through eight.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 08/31/15.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Boyd v. J.H. Boyd Enterprises, Inc., et al.***, Superior Court Case No. 14CECG03792

Hearing Date: **September 1, 2015 (Dept. 403)**

Motion: Demurrer to First Amended Complaint

Tentative Ruling:

To sustain the demurrer to the first cause of action as to Louise Autenrieb and Martha Marsh only, with leave to amend. To sustain the demurrers to the second, third and fourth causes of action as to Louise Autenrieb, Martha Marsh and Robert Marsh, with leave to amend. (Code Civ. Proc. § 430.10(e), (f).) Plaintiff is granted 10 days' leave to file a second amended complaint, which time will run from service of the order by the clerk. All new allegations in the second amended complaint shall be in **boldface** type.

Explanation:

Special demurrer

First, the demurrers to all causes of action should be sustained as to defendants Autenrieb and Martha Marsh because the FAC fails to clearly allege their capacity. Directors and majority shareholders of a corporation owe a fiduciary duty to minority shareholders. (See *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93.) While the FAC alleges that Robert Marsh is alleged to be a shareholder and director, Martha Marsh and Autenrieb were only alleged to have "acted as" officers and directors. That is a very uncertain allegation. The complaint should be amended to clarify this.

First cause of action

The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of fiduciary duty; (3) causation and (4) damage proximately caused by the breach. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.)

Defendants also demur to this cause of action on the ground that they are protected by the Business Judgment Rule ("BJR"). "[T]he presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts." (*Berg & Berg Enterprises v. Boyle* (2009) 178 Cal.App.4th 1020, 1045-46.)

However, the allegations of the FAC, which must be taken as true for purposes of ruling on the demurrer (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591), do not show that the

BJR would be applicable. The FAC alleges self-dealing, conflict of interest, corporate waste, and unequal distributions. (FAC ¶¶ 29-31, 33, 34.) At the pleading stage this is sufficient to rebut the presumption of the BJR.

Defendants also contend that plaintiff has not alleged facts showing she was damaged by the alleged breaches. Plaintiff argues that she was damaged because defendants are mismanaging the corporation and devaluing personal benefits from it to the exclusion of plaintiff, devaluing the corporation's worth, while preventing plaintiff from selling her shares at full value. (FAC ¶¶ 12, 16, 17, 25, 28, 30, 31, 33-35.) This is sufficient to allege that plaintiff was damaged by defendants' actions.

Thus, the demurrer is overruled as to Robert Marsh, since these are the only grounds raised as to him.

Second cause of action

A derivative action is one "filed on behalf of the corporation for injury to the corporation for which it has failed or refused to sue." (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 311-312.) A presuit demand on the directors is ordinarily required for the bringing of a derivative action. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 789.) A demand on the board of directors to act and refusal to act "need not be alleged if the facts that are alleged demonstrate that such a demand would have been futile." (*Koshaba v. Koshaba* (1942) 56 Cal.App.2d 302, 308.)

The FAC alleges "[e]fforts to get Defendants Martha Marsh, Robert Marsh and Louise Autenrieb to address these concerns are simply ignored as said Defendants essentially take the position that they can control the corporation without input or oversight from any other owner or director. Any further attempt to get these issues addressed is futile." (FAC ¶ 31.) In addition with the other allegations of the FAC, sufficient facts are alleged showing that any demand would be futile.

Third cause of action

The third cause of action is for both accounting and dissolution.

The demurrer as to the claim for dissolution is sustained because a complaint for dissolution must be verified. (Corp. Code § 1800(a).) The FAC is not.

Defendants also claim that it is unclear under what provision of the corporations code plaintiff seeks dissolution. The FAC alleges conduct falling within the category of Corp. Code § 1800(b)(4), persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness. Defendants even admit in their memorandum that the FAC alleges self-dealing, conflict of interest, corporate waste, and unequal distributions. (FAC ¶¶ 29-31, 33.)

The cause of action also seeks an accounting. An accounting is available where there is no adequate remedy at law or where the losses complained of cannot be ascertained. (*Civic W. Corp. v. Zila Indus., Inc.* (1977) 66 Cal.App.3d 1, 14.)

Defendants contend that the FAC fails to assert lack of an adequate remedy at law or that the losses cannot be ascertained.

The FAC merely alleges that the accounting is requested as part of the dissolution of the corporation to determine the status of the capital and other accounts in the corporation. However, plaintiff cites to no authority in support of this assertion. As plaintiff fails to allege that there is no adequate remedy at law, or the losses complaint of cannot be ascertained, the demurrer should also be sustained because plaintiff fails to allege a claim for accounting.

Fourth cause of action

This cause of action seeks declaratory relief regarding the enforceability of the Buy Sell Agreement.

Code Civ. Proc. § 1061 provides that "[t]he court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." Declaratory relief is not proper where the requested declaration would not have any practical consequences. (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 648 [declaratory relief not proper where plaintiffs failed to allege with particularity that their requested relief would have any practical consequences].)

The cause of action fails because the individual defendants do not have the power to grant the affirmative relief plaintiff seeks. The relief sought must be sought from the board as a whole, not three individual directors. Plaintiff's opposition does not address this argument.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 08/31/15 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(2)

Tentative Ruling

Re: ***In re Christina Cruz-Lopez***
Superior Court Case No. 15CECG00803

Hearing Date: September 1, 2015 (Dept. 501)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 8/31/15 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Switzer v. Flournoy Management, LLC, et al.***, Superior Court Case No. 11CECG04395

Hearing Date: **September 1, 2015 (Dept. 501)**

Motion: Demurrers to McCormick Defendants' Answers to Switzer's Cross-Complaint; Motion for Reconsideration of Code Civ. Proc. § 170.6 Disqualification

Tentative Ruling:

To sustain, without leave to amend, the demurrers to the fifth, eighth and ninth affirmative defenses of the amended answer of cross-defendants McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, Gordon Park, Dana Denno and Irene Fitzgerald (McCormick defendants"). (Code Civ. Proc. § 430.20.)

To deny the motion for reconsideration. (Code Civ. Proc. § 1008.)

Explanation:

Motion for Reconsideration

Ted Switzer requests reconsideration of the July 7, 2015 disqualifiation of Judge Jeffrey Hamilton pursuant to Code Civ. Proc. § 170.6.

An order that can be reevaluated on a motion for reconsideration. The proper procedure to take in the trial court for party objecting to the grant of a Code Civ. Proc. § 170.6 disqualification motion is to make a motion for reconsideration to the new judge assigned to the case, and for the new judge to consider and rule on the merits of the reconsideration motion. (*Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 426-427.) Since the 170.6 motion was ruled on without notice or opportunity to oppose by any other party, the arguments and facts raised in this motion constitute new or different matters under Code Civ. Proc. § 1008(a). (*Garcia v. Hejmadi* (1997) 58 Cal.4th 674, 689-690.) So now to the merits.

> "[N]either side in a proceeding may make a motion under section 170.6 after trial has commenced or the trial judge has resolved a disputed issue of fact relating to the merits. (§ 170.6, subd. (a)(2); *Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 60, 116 Cal.Rptr.2d 616 (*Stephens*).) Importantly, these limitations apply even to third parties who are brought into an action or special proceeding after a challenge has been made or a factual issue has been determined. (See *School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1135, 68 Cal.Rptr.2d 612 [after challenge made]; *Stephens,* at p. 61, 116 Cal.Rptr.2d 616.)"

(*National Financial Lending, LLC v. Superior Court* (2013) 222 Cal.App.4th 262, 270.)

Switzer contends that Judge Hamilton resolved an issue of facts relating to the merits in ruling on the anti-SLAPP motion. The court disagrees. Judge Hamilton held that no evidence supporting the attorney-client privilege defense was presented in support of the anti-SLAPP motion, and further expressed the opinion that such evidence likely does not exist. The court does not consider this to be a resolution of a factual dispute. It more addressed the sufficiency of the evidence presented in the context of that particular motion, and the determination that no material privileged information would provide a defense because it necessarily would have a non-client, Switzer.

Demurrer

For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded (i.e., all ultimate facts alleged, but not contentions, deductions or conclusions of fact or law). (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967.) The allegations of the pleading are not accepted as true if they contradict or are inconsistent with facts judicially noticed by the court. (In ruling on a demurrer, the court may consider matters outside the complaint if they are judicially noticeable under Evid. Code §§ 452 or 453.) (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting allegation contradicted by judicially noticed facts].) The truth of a document's contents will not be considered unless the document is a judgment, statement of decision, or order. (*Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 844 fn.4.)

In overruling the McCormick defendants' demurrer to the cross-complaint, the court held that Civ. Code § 1714.10(a) does not apply in this action. The court clearly can take judicial notice of this ruling in the 12/16/13 order, which compels the sustaining of the demurrer to this affirmative defense.

The eighth affirmative defense is that the McCormick defendants cannot defend themselves against the derivative claims without disclosing information falling within the attorney-client privilege, and they cannot disclose that information because Flournoy has not waived the privilege.

Again, this demurrer is based on the court's ruling in the 12/16/13 order, holding that the attorney-client privilege due process defense does not apply in this case because the only material communications that could provide a defense would be disclosures necessarily involving a non-client, Switzer, which would render the communications unprivileged. Therefore, this defense provides no defense in this case.

The ninth affirmative defense is that the derivative claims are barred by the litigation privilege, Civ. Code § 47(b). In ruling on McCormick's demurrer to the cross-complaint, the court found that because the action does not arise out of protected activity, and the litigation privilege does not apply in an action by a client against its attorney for the breach of professional duties, the litigation privilege does not apply. That ruling totally negates this affirmative defense.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will

serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 8/31/15 .
(Judge's initials) (Date)

(28) ***Tentative Ruling***

Re: **Myles v. Krause, et al.**

Case No. 14CECG02793

Hearing Date: September 1, 2015 (Dept. 501)

Motion: By Defendants Stefanie J. Krause and the Law Office of Stephanie Krause, Moving to Compel Responses for Production of Documents, Set Nos. Two, Three and Four, and to Compel Responses to Special Interrogatories, Set Two; Request for Sanctions Against Plaintiff and Attorney of Record.

Tentative Ruling:

To grant as to both motions. Plaintiff shall have ten days in which to respond to the discovery requests. All objections are deemed waived. The Court awards sanctions in the amount of $515.00 for each motion for a total of $1,030.00.

Explanation:

[The Court notes that no opposition or reply brief appears in the Court's files.]

Where there has been no timely response to a Code of Civil Procedure §2031.010 demand, the demanding party must seek an order compelling a response. (CCP §2031.300.) This is also true for a lack of responses to served interrogatories. (CCP §2030.290.) There is no need to resolve informally. (CCP §§ 2030.290, 2031.300.) Failure to timely respond to these discovery requests waives all objections to the requests. (CCP §§2030.290, subd. (a); 2031.300, subd. (a).)

Here, Defendants have presented the Court with inspection demands and interrogatory requests which contain what appear to be valid proofs of service. There appears to be no responses served by Plaintiff to any of the discovery requests and there is no opposition to the motion appearing in the Court's files.

The Motion is therefore granted. Plaintiff shall have ten days from the date of service of this order in which to serve responses to the discovery without objections.

A court "shall" impose a monetary sanction against the losing party unless a party that made or opposed the motion with substantial justification or other reasons why sanctions would be unjust. (CCP §2031.300, subd. (c).) The amount requested for each motion, $700, included one hour at $185 per hour for a reply brief. Because there is no

reply brief, the Court will reduce the amount awarded for each motion to $515. Therefore, the sanctions of $515 for each motion is awarded, for a total of $1030.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 8/31/15.
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: ***Cordell v. Fresno Heritage Partners***
Superior Court Case No. 14CECG03523

Hearing Date: **September 1, 2015 (Dept. 501)**

Motion: Defendant Asha P. Sidhu, M.D.'s motion to strike

Tentative Ruling:

To Grant.

Explanation:

A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (CCP §§ 436(a), 431.10(b); *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-67.) Here, the general damages, as to Dr. Sidhu, are statutorily barred. (CCP § 377.34; see also *Gailing v. Rose, Klein & Marias* (1996) 43 Cal.App.4th 1570, 1577; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265.) The court notes that a Notice of Non-Opposition to this motion was filed on August 19, 2015. The motion is granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 8/31/15 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

03

Tentative Ruling

Re: ***Legare v. Contractors Resource, Inc.***
Case No. 15 CE CG 00518

Hearing Date: September 1st, 2015 (Dept. 502)

Motion: Defendant Contractors Resource, Inc.'s Demurrer to Complaint

Tentative Ruling:

To overrule Contractors Resource, Inc.'s demurrer to the complaint, in its entirety. (Code Civ. Proc. § 430.10, subd. (e).) To order defendant CRI to file and serve its answer to the complaint within 10 days.

Explanation:

Defendant CRI demurs to all four causes of action on the ground that they fail to state facts sufficient to state a claim against CRI because all of the causes of action rely on the existence of an employment relationship between plaintiff and defendant, and there are no factual allegations that CRI was plaintiff's employer. However, plaintiff clearly alleges in paragraph 4 of the complaint that CRI and All Systems Electrical were joint employers of plaintiff and employers within the meaning of Government Code section 12926, subd. (d). (Complaint, ¶ 4.)

While CRI complains that plaintiff's allegations of an employment relationship are nothing more than legal conclusions that should be disregarded by the court on demurrer, the allegations are sufficient to support a showing of an employment relationship.

"The complaint in a civil action serves a variety of purposes, of which two are relevant here: it serves to frame and limit the issues and to apprise the defendant of the basis upon which the plaintiff is seeking recovery. In fulfilling this function, the complaint should set forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts." (*Committee On Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 211-212, internal citations omitted, superseded on other grounds by statute.)

An allegation that a party was an employee of another party is considered to be sufficient to show that an employment relationship existed between the parties. (*May v. Farrell* (1928) 94 Cal.App. 703, 707-708.)

"As held in *Kuhl v. United States Health & Accident Ins. Co*., 112 Minn. 197 [127 N. W. 628], the terms 'scope of employment' and 'course of employment,' like

negligence, are now generally regarded as conclusions of fact, and under liberal rules of pleading a complaint containing such allegations is sufficient to justify the admission of evidence in support thereof. As was said in *Haines v. Parkersburg M. & I. Ry.*, 71 W. Va. 453 [76 S. E. 843], 'to require a specification of the particular duties with which the servant is charged would impose upon the plaintiff more than is necessary for the accomplishment of the office and purpose of the complaint-a duty to allege matters lying peculiarly within the knowledge of the defendant and often beyond that of the plaintiff.' And as held in *Goldstein v. Healy*, 187 Cal. 206 [201 Pac. 462], less particularity is required where the defendant, from the nature of and his relation to the facts, has full information concerning them." (*Ibid*.)

Thus, while the allegation that CRI and All Systems were "joint employers" of plaintiff is somewhat conclusory, it is considered to be an allegation of ultimate fact that is permissible and sufficient to support the employment-related claims. It would be unreasonable to require plaintiff to allege additional evidentiary facts to support his claim that there was an employment relationship, especially since most of these facts are presumably within the knowledge of the defendant and outside of plaintiff's possession. Any doubts that defendant may have about whether an employment relationship existed can be resolved through discovery.

Also, while defendant relies on *Martinez v. Combs* (2010) 49 Cal.4th 35 to support its position that plaintiff needs to allege more facts to show that an employment relationship existed, *Martinez* is inapplicable here. *Martinez* was decided after the alleged employer brought a summary judgment motion, so the issue was whether there was actual evidence of an employment relationship. (*Id*. at 64-69.) Here, on the other hand, the defendant is demurring to the complaint, so the question of whether plaintiff can prove an employment relationship is irrelevant. The only issue is whether plaintiff has adequately alleged that such a relationship existed.

In addition, *Martinez* was dealing with the definition of "employer" used by the Industrial Welfare Commission because plaintiff was raising a wage and hour claim. (*Id*. at 64.) Here, by contrast, plaintiff is alleging claims for retaliation, discrimination, wrongful termination, and defamation, not wage and hour claims, so the definition of "employer" used by the Commission is not necessarily applicable. The Supreme Court certainly never ruled that the IWC's definition of "employer" had to be alleged in order to state a claim for discrimination, retaliation, or wrongful termination in a FEHA action. Therefore, *Martinez* is inapplicable to the present case, and does not support the defendant's position that the plaintiff's claims are insufficiently alleged.

Consequently, since plaintiff has adequately alleged the ultimate fact that he was employed by defendant CRI, the court intends to overrule the demurrer as to all four causes of action and order CRI to file its answer.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: **DSB** (Judge's initials) **on** **8-28-15** (Date) .

(24) **Tentative Ruling**

Re: ***Wells Fargo Equipment Finance, Inc. v. Central Valley Presort***
Court Case No. 15CECG01837

Hearing Date: **September 1, 2015 (Dept. 502)**

Motion: 1) Plaintiff's Applications for Writs of Attachment as to defendants Eric L. Kozlowski, Central Valley Presort, Inc., and Integrated Voting Solutions, Inc.
2) Plaintiff's Application for Writ of Possession as to Defendant Central Valley Presort, Inc.

Tentative Ruling:

To grant all applications for Writs of Attachment and Writ of Possession. The plaintiff's bond on each Writ of Attachment is set at $10,000. The defendant's bond which defendant Central Valley Presort is required to post in order to prevent plaintiff from taking or regaining the property is set at $230,000.00. (Code Civ. Proc. § 515.020.) The court will sign the orders presented.

Explanation:

All defendants were personally served with notice of these applications, and did not oppose them or file claims of exemption.

Attachment:

Plaintiff establishes that this claim is one on which an attachment may be issued by Mr. Mulgrew's declaration showing that this claim is for money based on an express contract, of a fixed or readily ascertainable amount not less than $500, that the debt is not secured by real property, and that it is a commercial claim. (Code Civ. Proc. § 483.010; *Goldstein v. Barak Const.* (2008) 164 Cal.App.4th 845, 851.) The costs and attorney fees included in the amount sought to be attached appear reasonable. Plaintiff has established the probable validity of its claim. Plaintiff has provided sufficient evidence to conclude as to the individual defendant guarantor that the claim arises out of the conduct by defendant of a trade, business, or profession. (See *Advance Transformer Co. v. Superior Court* (1974) 44 Cal.App.3d 127, 144.)

Possession:

The request for a writ of possession is properly based on a cause of action for claim and delivery. The property is sufficiently described. (Code Civ. Proc. § 512.010(a).) Plaintiff has adequately established its right to possession of this property. It has sufficiently described its location. Defendant Central Valley Presort was personally served with notice of this motion, and did not file any opposition to it. From the evidence presented, it appears that the value of the property is less than the amount defendant owes under the contract related to this property, such that defendant's

interest in it is valued at $0. Therefore, the plaintiff's bond requirement is waived. (Code Civ. Proc. § 515.010, subd. (b).) Defendant's bond is properly set at $230,000.00. (Code Civ. Proc. § 515.020.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 8-28-15 .
(Judge's initials) (Date)

(28) ***Tentative Ruling***

Re: **Herold, et al. v. James, et al.**

Case No. 14CECG03898

Hearing Date: September 1, 2015 (Dept. 502)

Motion: By Plaintiffs Robert and Kim Herold as Trustees of the RT and KM Herold Living Trust for Judgment on the Pleadings; By Defendant Martha James aka Martha Pendergrass for Leave to Amend Answer to First Amended Complaint.

Tentative Ruling:

To grant the Motion for Leave to Amend the Answer to the First Amended Complaint. Defendant shall have five court days in which to serve and file the amended answer.

The Motion for Judgment on the Pleadings is denied as moot.

Explanation:

Motion to Amend

A court may, "in the furtherance of justice and on such terms as may be proper allow a party to amend any pleading." (Code Civ.Proc. §473, sub.(a)(1).) It is the policy of the courts to permit amendments of pleadings liberally in order that litigation may be tried on its merits. (*Douglas v. Superior Court* (1989) 214 Cal.App.3d 155, 158; *Cardenas v. Ellston* (1968) 259 Cal.App.2d 232, 238.) "If a motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where refusal also result in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

Plaintiffs claim that the motion to amend could have been brought earlier in the proceedings and that this alone justifies denial. However, the policy in allowing amendments of pleadings continues at any stage of the proceedings up to and including trial, so long as no prejudice is shown. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.) Therefore, mere delay without prejudice is not sufficient grounds to deny the motion.

Plaintiffs argue that "Plaintiffs will be unable to conduct any further discovery to verify or challenge the contents of the amended answer." (Plaintiffs' Opposition at p.3.) But Plaintiffs have pointed to no actual discovery or evidence that they would not

already be in possession of as part of their pursuit of the other thirteen causes of action. (*See, e.g., Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488 (prejudice exists where there is a delay in trial which results in the loss of critical evidence or added costs of preparation or burden of discovery).) In short, Plaintiffs have not presented any evidence of any prejudice which might overcome the policy of liberality in allowing amendment of pleadings. Absent such a prejudice, the Court grants the motion and allows the Defendants to amend their answer.

Motion for Judgment on the Pleadings

Because the Court grants the motion for leave to amend the answer, the motion for judgment on the pleadings based on Defendant's failure to provide a verified answer is denied as moot.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 8-18-15.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Clark v. The Neil Jones Food Co. dba Toma Tek et al.***
Superior Court Case No. 14CECG01338

Hearing Date: September 1, 2015 **(Dept. 502)**

Motions: Demurrer by Defendant Tourville to the Second Amended Complaint and motion to strike

Tentative Ruling:

To continue the hearing to September 15, 2015 at 3:30 p.m. in Dept. 502.

Explanation:

On July 6, the Clerk's Office sent the moving party's attorney notice that the documents (demurrer and motion to strike) were being returned without filing due to failure to pay $120 in filing fees. According to the Register of Actions, the filing fees have not been paid. Therefore, the hearing will be continued to allow the moving party time to pay the fees.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 8-31-15 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***State of California v. Heirs and Devisees of Gertrude Paxton***
Court Case No. 15CECG00498

Hearing Date: **September 1, 2015 (Dept. 502)**

Motion: Motion for Order for Possession

Tentative Ruling:

To grant. The court will sign the form of order provided by plaintiff. Additionally, the court sets aside and vacates, *sua sponte,* the [Proposed] Order for Possession which was signed and filed in error on May 12, 2015.

Explanation:

The motion satisfies all the statutory requirements. The requirement of entitlement to the taking and sufficient deposit are met. The declaration of Hugo Mejia also establishes the severe hardship plaintiff will face if it does not have an order for possession by September 15, 2015. Any delay will have a domino effect on the rest of the project between Madera and Fresno, which will in turn delay the project extending from there. Thus, there is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment, and the plaintiff will suffer a substantial hardship if the application for possession is denied or limited. (Code Civ. Proc. § 1255.410, subd. (d)(2).)

All named individual defendants have been served. The opposition filed by Robert L. Williams does not state a basis to deny possession. Any opposition to the appraised value can still be addressed by a properly noticed motion under Code of Civil Procedure Section 1255.030, which allows any party having an interest in the property to have the valuation re-determined. There is no hardship noted by Mr. Williams that is greater than the overriding need plaintiff has to obtain prejudgment possession of the property. Plaintiff will suffer a substantial hardship if the application for possession is denied or limited." (Code Civ. Proc. § 1255.410, subd. (d)(2).)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: **DSB** (Judge's initials) **on** **8-31-15** (Date) .

Tentative Rulings for Department 503

(2)

Tentative Ruling

Re: ***Berry v. Trujillo***
Superior Court Case No. 14CECG00859

Hearing Date: September 1, 2015 (Dept. 503)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

Having failed to file a petition to approve the compromise the hearing is off calendar. Petitioner must obtain a new hearing date for consideration of any future petition filed. Petitioner must comply with Super. Ct. Fresno County, Local Rules, rule 2.8.4. The Court notes that this is the second time the attorney for the plaintiffs has scheduled a hearing and failed to file the petition.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 8-28-15 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Minor S. v. Blancas et al.***, Superior Court Case No. 13CECG03460

Hearing Date: **September 1, 2015 (Dept. 503)**

Motion: Compel Further Responses to Amended Special Interrogatories, Set Two

Tentative Ruling:

To grant as to amended special interrogatory nos. 59-83; to deny as to no. 84. (Code Civ. Proc. § 2030.300(a).) Plaintiff shall serve amended responses without objections within 20 days of service of the order. To deny all requests for sanctions. (Code Civ. Proc. § 2030.300(d).)

Explanation:

The District propounded Special Interrogatories, Set Two (nos. 59-89), to which plaintiff largely failed to provide responsive information based on objections as to how the interrogatories were drafted. In meet and confer, plaintiff "suggest[ed] [that the District] propound newly phrased special interrogatories consistent with the requirements of the code of civil procedure." (Anwyl Dec. Exh. 4.) Before the deadline to file a motion to compel, and to avoid involving the court in the discovery dispute, the District re-worded the interrogatories to address plaintiff's objection, kept the numbering the same, and named them Amended Special Interrogatories, Set Two (nos. 59-84). Plaintiff again refused to provide substantive responses, claiming various failures to comply with the Discovery Act.

This is the sort of game playing that the court wishes to discourage. Discovery Act was enacted to take away "the sporting theory of litigation, namely, surprise at trial." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.) The Discovery act is to be liberally construed in favor of disclosure of information. (*Id.* at 377-378.) A court should not disallow discovery based on upon a technical objection when the information sought is otherwise subject to discovery. (*Id.* at 381.)

Plaintiff takes inconsistent positions in the opposition as to how the District should have proceeded. Plaintiff says at one point in the opposition that the District should have served a set three beginning with interrogatory no. 90. (Oppo. 10:3-12.) "A party propounding interrogatories shall number each set of interrogatories consecutively." (Code Civ. Proc. § 2030.060(a).) But then plaintiff argues that the motion should be denied because defendant is precluded from propounding the same questions, even if reworded, in a later set of interrogatories. (See *Cal. Practice Guide: Civ. Proc. Before Trial* ¶ 8:1150.5 ["The party who failed to meet the 45-day deadline cannot 'reset the clock' by asking the same questions again in a later set of interrogatories"].) It almost appears that the suggestion to serve a re-worded set of interrogatives was a trap to try to get the District to lose the right to seek substantive responses to these interrogatories

at all. Since the amended interrogatories were served before the 45-day time limit to file a motion to compel, and it was plaintiff's counsel that suggested serving re-worded interrogatories, the court will consider the amended interrogatories to supersede and supplant the original set.

The declaration for additional discovery substantially complies with Code Civ. Proc. § 2030.050, which requires a declaration that "contain[s] substantially" the elements set forth therein.

Plaintiff correctly points out that certain objections were not addressed in the District's meet and confer letters. The moving party must meet and confer on "each issue presented by the motion." (Code Civ. Proc. § 2016.040.) Most responses included the objection that the interrogatories seek expert opinions from a lay person. The court will not deny the motion for failure to meet and confer on this objection because it so clearly lacks merit. Discovery pertaining to the factual basis, witnesses and writings upon which a contention is based is specifically provided for in Code Civ. Proc. § 2030.010(b). These interrogatories seek information relation to contentions set forth in plaintiff's FAC.

While plaintiff did provide some substantive information in response to a few of the interrogatories in the original set (nos. 59, 63, 64, 66, 71, 75, 79), that substantive information was provided subject to the objections to the wording of the original interrogatories. The court cannot ascertain whether information was withheld based on those objections. And there really is no great burden here. If the information previously provided is all the information available to plaintiff, then that information could simply be copy and pasted from the prior response.

However, the motion will be denied as to amended interrogatory no. 84 (numbered 89 in the original Set Two), which asks plaintiff to provide the full names of all individuals who they contend have ever been sexually abused by Blancas. Plaintiff asserted multiple objections that weren't made in response to other interrogatories, including attorney-client privilege, disclosure of client confidence and secretes protracted from disclosure by Bus. & Prof. Code § 6068(e)(1), and third party privacy rights. Plaintiff also provided substantive information in response. The District did not meet and confer on these specific objections in connection with either version of Set Two. (Anwyl Dec. Exhs. 3, 7.) The motion should be denied as to this interrogatory in light of the failure to meet and confer at all regarding these very significant objections involving rights of third parties.

The remainder of the objections to the amended interrogatories are overruled.

Though the motion is granted in large part, the court will not award any party sanctions due to the unusual approach taken by the District, which did include some technical non-compliance with certain provisions of the Code of Civil Procedure. (Code Civ. Proc. § 2030.300(d).)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will

serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 8-28-15 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Guerrero v. Kidd***
Court Case No. 15CECG01569

Hearing Date: **September 1, 2015 (Dept. 503)**

Motion: Motion to Strike Claim for Punitive Damages

Tentative Ruling:

To deny motion to strike punitive damages claim. To grant request to strike the Third cause of action for "Intentional Tort," with the *caveat* that the typewritten allegations on the page containing this cause of action will <u>not</u> be stricken, but rather will be deemed a part of the "Exemplary Damages Attachment."

Explanation:

As an initial matter, the court has disregarded defendant's improper characterization of the accident in her argument (that it was a "rear-ender" and a "routine fender-bender," and that the investigating officer described it as a non-injury traffic collision, with no ambulance being dispatched). As with a demurrer, a motion to strike considers (and assumes as true) only the facts as they appear on the face of the pleading under attack, or from matters judicially noticeable. (Code Civ. Proc. § 437.) Defendant's statements are outside of the pleadings and are not judicially noticeable, so have no place in the analysis.

In *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 893 ("*Taylor*"), the California Supreme Court held that where a defendant did not intend to harm plaintiff, to justify punitive damages based on intoxication the plaintiff must allege a conscious disregard for the rights or safety of another; plaintiff must allege facts showing "defendant was aware of the probable dangerous consequences of his conduct and that he willfully and deliberately failed to avoid those consequences." (*Id.* at pp. 895-896.) There, plaintiff alleged defendant's history of alcoholism, his prior arrests and convictions for drunk driving, his prior accident attributable to his intoxication, and his acceptance of employment involving transporting alcoholic beverages. (*Id.* at p. 896.) The court found this sufficient to allege conscious disregard for the safety of others. (*Id.*) It noted that the essential gravamen of a complaint that would sustain a prayer for punitive damages was that "Defendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby." (*Id.*) In 1980, the Legislature amended the definition of malice in Civil Code Section 3294 to adopt the definition as stated in *Taylor* (as r*ecognized in Lackner v. North* (2006) 135 Cal.App.4th 1188, 1211).

In 1987, the Legislature amended the statute again to add a criterion for "unintentional malice" which required plaintiff to prove that the conscious disregard displayed by defendant was "despicable" and "willful." It also elevated the standard of proof to clear and convincing evidence. (See Civil Code § 3294.) In *College Hospital*

Inc. v. Superior Court (1994) 8 Cal.4th 704, *as modified (Nov. 23, 1994)* the Supreme Court noted that the requirement to prove "despicable" conduct (i.e., under circumstances that are "base," "vile," or "contemptible") seemed to represent "a new substantive limitation on punitive damage awards." (*Id.* at p. 725.)

In *Lackner v. North, supra*, 135 Cal.App.4th at p. 1211 ("*Lackner*"), the court discussed the 1987 legislative change, and specifically mentioned that when *Taylor, supra*, had been decided "despicable conduct was not a requirement." (*Lackner, supra,* 135 Cal.App.4th at p. 1212.) However, it did not suggest that *Taylor* was no longer good law; indeed, it indicated that the circumstances alleged in *Taylor* (as noted above) were "far worse" than what plaintiff had alleged in the case before it, which involved a skier who had collided with plaintiff while skiing downhill at a high rate of speed, severely injuring plaintiff. In other words, the implication is that the conscious disregard alleged in *Taylor* sufficiently alleged *despicable* conscious disregard for the safety of others. (*Id.* at p. 1212, and *fn* 14.)

This appears consistent with the case of *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928 ("*Sumpter*"). Even though *Taylor* was not mentioned in *Sumpter,* the cases are factually similar: *Sumpter* involved a defendant who caused an accident while under the influence of methamphetamines. While it was not a pleading case (plaintiff appealed the judgment as to the amount of compensatory damages, and the jury's failure to award punitive damages), it is instructive to note that the complaint sought punitive damages "on the ground [defendant] engaged in despicable conduct with a willful and conscious disregard to the rights or safety of others, <u>*in that he knew he was under the influence while driving the vehicle*</u>." (*Sumpter at p.* 932, emphasis and brackets added.) Since the case proceeded to trial, it is obvious that *the complaint cleared the pleading stage*. The court went on to acknowledge that the facts proven at trial <u>*did*</u> show the requisite "despicable conduct" to support punitive damages: defendant knew he was knew he was under the influence when he got into his car, and knew the light was red for over a quarter mile before he entered the intersection, yet he never braked, choosing instead to take the risk and run the red light. "Such conduct reflects a conscious disregard for the rights and safety of others and would have supported the imposition of punitive damages in this case." (*Id.* at p. 936—finding, however, that this did not entitle plaintiff to punitive damages as a matter of right, but rather this decision was exclusively for the jury to decide.)

Here, plaintiff has alleged defendant willfully consumed alcoholic beverages to the point of intoxication, knowing that in her impaired condition she would be unreasonably dangerous to other drivers on the road. Nonetheless, she willingly, and in conscious disregard for the rights and safety of other drivers, drove her vehicle after consuming copious amounts of alcohol. Plaintiff alleges that defendant not only consumed alcohol before driving, but that she *consumed alcohol while operating the vehicle*, knowing this impaired her ability to safely drive a vehicle. He alleges defendant was traveling with open containers of alcohol. While he does not use the word "despicable," in describing this conduct, he alleges that defendant's behavior rose to the level of malice and oppression under Civil Code Section 3294, which sufficiently brings in this descriptor. These allegations are sufficient, even without adding the additional facts plaintiff has suggested he could allege if required to amend; they

certainly go even further than the complaint's allegations in *Sumpter* did, and are closer to the *facts proven* in that case, which were found sufficient to support punitive damages. The request to strike the demand for punitive damages must be denied.

However, the facts alleged do not support a cause of action for "intentional tort." The only allegations supporting "intentional conduct" are the same allegations supporting punitive damages. Allowing this cause of action to stand would essentially elevate a claim for punitive damages into an independent cause of action, which would be improper. Plaintiff relies on *Taylor,* which was clearly a negligence claim. (See *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 160—discussing *Taylor* and other cases involving "*nondeliberate or unintentional tort* where the defendant's conduct constitutes a conscious disregard of the probability of injury to others" (emphasis added). See also *Lackner, supra,* 135 Cal.App.4th at p. 1212—also recognizing these were cases "involving *unintentional torts*" (emphasis added).) Likewise, plaintiff also relies on *Sumpter,* where plaintiff's complaint was also grounded in *negligence* (*Sumpter, supra*, 158 Cal.App.4th at p. 931.) The request to strike this cause of action must be granted, with the *caveat* that the factual allegations on this page should not be stricken, but rather simply be deemed a part of the demand for punitive damages.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 8-31-15 .
(Judge's initials) (Date)